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Via Regular and

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RE: Delta Plan Final Programmatic Environmental Impact Report [SCH #2010122028]

Council Members:

The San Luis & Delta-Mendota Water Authority and State Water Contractors (collectively, the "Public Water Agencies") submitted comments in February 2012 on the Delta Plan Draft Program Environmental Impact Report ("DEIR"), in January 2013 on the Recirculated Delta Plan Draft Environmental Impact Report ("RDEIR"), and now submit comments on the May 2013 Final Delta Plan Programmatic EIR ("FEIR"). As before, the Public Water Agencies write on their own behalf and on behalf of their member agencies to express significant concerns with the FEIR. The Public Water Agencies have reviewed the FEIR, including the responses to comments on the Delta Plan ("the Project"). However, the FEIR does not adequately address the deficiencies under the California Environmental Quality Act ("CEQA") identified in the Public Water Agencies' previous letters on the DEIR and RDEIR, and all of the serious issues identified in those comment letters remain. Because the Public Agencies' comments on those documents are not adequately addressed in the FEIR, they remain valid and relevant, and we reiterate them and incorporate them by reference as if set forth fully herein.

Because of the continuing legal deficiencies in the FEIR, the Public Water Agencies are opposed to certifying the EIR as currently drafted. The Public Water Agencies hereby request that the Delta Stewardship Council ("Council") revise the EIR to make it fully compliant with CEQA and recirculate it before taking action.

The FEIR Fails to Adequately Respond to Comments on the DEIR and RDEIR

The FEIR fails to adequately respond to the comments submitted on the DEIR and RDEIR, including failing to adequately respond to comments submitted by the Public Water Agencies. CEQA requires that responses to comments must be detailed and provide a reasoned analysis in response to every comment submitted on an environmental document. (State CEQA Guidelines, § 15088(b).) CEQA further requires that agencies must provide a "good faith,

reasoned analysis and response” to comments received on the EIR and “conclusory statements unsupported by factual information will not suffice.” (*Ibid.*) Agencies must address recommendations and objectives *in detail* and explain why specific comments and suggestions were not accepted. (*Ibid.*) The need for a detailed, reasoned factual response is particularly acute when critical comments have been made by agencies or other experts. (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of Oakland* (2001) 91 Cal.App.4th 1344, 1367; see also *People v. County of Kern* (1976) 62 Cal.App.3d 761, 772.)

The FEIR violates CEQA because it fails to adequately address comments, suggestions, and recommendations made by the Public Water Agencies and others. Due to the extremely large number of comments and responses, a comprehensive list of all the insufficiencies is impossible to include. The following paragraphs present just a small number of the many legal insufficiencies relating to the Responses to Comments (“RTCs”) in the FEIR.

First, regarding specific responses to the Public Water Agencies’ concern, the vast majority were dismissed as “comment noted” or “n/a” or with a mere reference to a Master Response without any further discussion. This alone is inadequate, as the Public Water Agencies raised a number of important, specific issues that demand a detailed, reasoned response under CEQA.

Second, for the comments that were dismissed with a mere reference to a Master Response, the Master Responses did not fully address the issues raised by the comment. As just one example, in response to lengthy questions relating to cumulative impacts, the RTCs, with no additional responses or analysis, merely advise reading Master Response 2. (See, e.g., RTC LO232-43.) However, Master Response 2 *does not address any of the issues raised by the Public Water Agencies’ relating to cumulative impacts*. Accordingly, the RTC fails as a matter of law to entail a detailed, “good faith, reasoned analysis and response.”

Third, the Master Responses are overall legally inadequate and merely reiterate the deficiencies of the DEIR and RDEIR without fixing any of them. As just one example among many, Master Response 2 claims that, “because of the programmatic nature of [the] PEIR,” the use of any “specific quantitative thresholds . . . would be inappropriately speculative.” (FEIR Vol. 4, Binder 1, § 2.3.) While lead agencies may formulate significance standards specifically for a particular project under review, standards that have been adopted by regulatory agencies are presumed to provide an adequate level of protection and thus are commonly relied upon and have withstood judicial scrutiny. (See, e.g., *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912; *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74; *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428.) The use of regulatory agency thresholds of significance would disclose to the public and the Council the nature of the impacts here, and they or other legally adequate thresholds are necessary to support the EIR’s conclusions regarding significance. There is no support for the proposition that utilizing an existing threshold of significance is somehow “speculative.”

In addition, in the Master Responses, and elsewhere, the FEIR repeatedly relies on the programmatic nature of the document to excuse thorough, adequate review under CEQA. However, the programmatic nature of the document does not excuse the EIR from relying on concrete substantial evidence to support a conclusion of significance or insignificance.

Fourth, Master Response 2 fails to recognize the purpose for commenters' request that the EIR discuss the social, economic, and other effects of the enormous impacts to agriculture that the Project will create. (See Master Response 2 at 3-29 to 3-30.) Significant impacts to agriculture have a high likelihood of leading to other significant impacts, including impacts that could lead to additional indirect impacts to air quality, biological resources, geology and soils (due to loss of topsoil), aesthetics (due to abandoned fields). (See, e.g., *Westlands Water Dist. v. United States* (E.D. Cal. 1994) 1994 U.S.Dist.LEXIS 6260, *7-8 [increased land fallowing has attendant increases in fugitive dust emissions]; Brian E. Gray, *The Market and the Community: Lessons from California's Drought Water Bank* (2008) 14 *Hastings W.-N.W. J. Env. L. & Pol'y* 41, 87 [fallowing land reduces food and nesting habitat for wildlife]; *Westlands Water Dist. v. United States* (E.D. Cal. 1994) 1994 U.S.Dist.LEXIS 6276, *52 [finding lack of water for farmland could result in soil erosion and depletion of quality soil]; Sharratt et al., *Loss of Soil and PM10 from Agricultural Fields Associated With High Winds on the Columbia Plateau* (2006) 32 *Earth Surf. Process, Landforms*, 621-630 [fallowing leads to increased levels of soil erosion]; *Soil Erosion: A Food and Environmental Threat* (2006) 8 *Environment, Development and Sustainability* 119-137, 124 (2006) [leaving cropland unplanted exposes soil to erosion; soil erosion in the United States costs billions of dollars in loss of productivity].) Abandoned areas can also lead to blight and urban decay. These are environmental, not just social and economic, impacts, and the EIR should be revised to recognize and analyze *all* of these potential direct and indirect impacts, not just air quality and agriculture, and then recirculated. The other Master Responses are similarly inadequate.

Fifth, in addition to the Master Responses legal insufficiency, the few specific RTCs that actually responded to a comment by the Public Water Agencies were also legally inadequate. For example, Comment RLO033-31 points out that much of the "science" upon which the EIR is based is inadequate, unsubstantiated, and has been found legally inadequate by a court. For this reason, the EIR's reliance on such information is improper, as erroneous and incorrect "information" does not qualify as substantial evidence. (See *Berkeley Keep Jets Over the Bay Committee, supra*, 91 Cal.App.4th at p. 1367 ["By using scientifically outdated information . . . , we conclude the EIR was not a reasoned and good faith effort to inform decision makers and the public about the increase in [toxic air contaminant] emissions that will occur as a consequence of the Airport expansion"].)

Rather than addressing the insufficient nature of the data upon which the EIR relies, Response to Comment LO175-9 claims that comment RLO033-31 is merely a comment on the Project, not a comment on the EIR, and therefore declines to provide any response. (See also, e.g., RTC LO 175-9 [same defect].) The RTC's statement is incorrect, because the lead agency's conclusions in the EIR must be supported by substantial evidence, which is defined as facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (State CEQA Guidelines, § 15384.) Argument, speculation, unsubstantiated opinion, and erroneous or inaccurate information does not constitute substantial evidence, and is therefore insufficient to support the EIR's conclusions. (*Ibid.*).

In addition, one comment on the RDEIR noted that, for some environmental issues (including visual resources and geology), areas outside the Delta were not analyzed. (Comment LO232-48.) The RTC merely states that the comment is incorrect and cites pages RDEIR 8-14 (for visual resources) and 11-4 (for geology). However, RDEIR page 8-14 relates to construction-related

impacts and has only four sentences discussing the visual impacts of these. These sentences make reference to “the river” and other visual resources in the Delta and Delta watershed. The entirety of the analysis of areas outside the Delta is that “facilities may be located in the Delta, Delta watershed, and areas outside the Delta that use Delta water.” This statement is supported by no facts or actual analysis of those impacts, and therefore does not in any way address the Public Water Agencies’ concerns. Similarly, RDEIR page 11-4 refers to “Delta peat soil” and appears to only concern geologic, construction-related impacts in the Delta area, not the large areas outside the Delta that would be significantly impacted. The RTCs are required by CEQA to address the Public Agencies’ comments, and these responses and the many like it are inadequate as a matter of law.

Sixth, comments to other agencies are equally inadequate. For example, the Alameda County Flood Control and Water Conservation District, Zone 7, noted in a comment letter that the Delta Stewardship Council does not have the authority to control and micromanage local water agencies, which is a primary part of the Delta Plan reviewed in the EIR. The RTC addressing this comment dismissed it with the statement that “[t]his is a comment on the project, not on the EIR.” (See Response to Comment LO169-4.) This response does not comport with CEQA. Whether the lead agency has the power to carry out an aspect of a project or mitigation measure is a relevant concern under CEQA. (See, e.g., State CEQA Guidelines, §§ 15040, 15041; *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1014-1015.) This legal insufficiency exists as to many RTCs. (See, e.g., RTC LO175-12 [for comment that project objectives are inadequate, response erroneously states that this is a comment on the Project, not the EIR]; RTC LO195-13 [comment that Draft Delta Plan has changed the definition of “project,” a term of art under CEQA, for the Delta Plan, RTC merely states that this is a comment on the Project], Master Response 2 at p. 3-27 [claiming that the Project’s compliance with the Delta Reform Act is a comment on the Project, not a comment on the EIR].) Similar defects exist throughout the RTCs

The Council Failed to Provide the Public Water Agencies With a Copy of the RTCs

At least 10 days before certifying a final EIR, the lead agency must provide public agencies that commented on the Draft EIR with a written proposed response to the agency’s comments. (Pub. Res. Code, § 21092.5.) Although the EIR is currently scheduled to be considered and certified on May 16 or 17, less than 10 days from the date of this letter, the responses were never sent to the Public Water Agencies, which constitutes a per se failure to proceed in the manner required by CEQA.

A Substantially Revised Draft EIR Must Be Prepared, Issued, and Recirculated for Public Comment

If a lead agency adds significant new information to an EIR subsequent to the close of a public comment period but before certification of a final EIR, CEQA requires the lead agency to provide a new public comment period. (Pub. Res. Code, § 21092.1.) “The primary reason for soliciting comments from interested parties is to allow the agency to identify, at the earliest possible time, the potential significant adverse effects of the project and alternatives and mitigation measures that would substantially reduce these effects.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1129.)

In this instance, the DEIR and RDEIR need to be rewritten and recirculated because of the legal insufficiencies previously identified in the Public Water Agency's comment letter, all of which still remain. Fixing the many problems with the DEIR and RDEIR will require significant further analysis and acknowledgement of additional significant impacts, which will require recirculation.

Project Findings, Mitigation Monitoring and Report Plan, and the Statement of Overriding Considerations Are Legally Deficient

CEQA requires that findings be made for each significant environmental impact identified in the EIR and that each finding must be accompanied by a brief explanation of the rationale for the findings. (Pub. Res. Code, § 21081; State CEQA Guidelines, § 15091.) These findings must be supported by substantial evidence in the record, and the agency must present some explanation to supply the logical step between each finding and that fact in the record. (State CEQA Guidelines, § 15091(a).) In addition, when an agency approves a project that will have significant environmental effects that will not be mitigated to a level of less than significant, a statement of overriding considerations must be prepared that weighs the project's proposed benefits against its unavoidable environmental risks. (Pub. Res. Code, § 21081.) Such adverse impacts may be determined to be acceptable only if the benefits outweigh those risks. (State CEQA Guidelines, § 15093(a).) The adoption of a statement of overriding considerations violates CEQA if the alleged benefits of the project are not supported by substantial evidence in the record. (*Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1223.) CEQA does not authorize an agency to adopt a statement of overriding considerations and proceed with a project that will have significant, unmitigated impacts on the environment, unless the measures or alternatives necessary to mitigate those effects are infeasible. (*City of Marina v. Board of Trustees* (2006) 39 Cal.4th 341; State CEQA Guidelines, § 15092(b).)

The Public Water Agencies have also reviewed the findings (including the statement of overriding considerations) and the MMRP posted on the Council's website and find these legally insufficient as well. The Public Water Agencies object to the findings on the grounds that there is no substantial evidence in the administrative record that supports many of the findings, and that many could be reduced or eliminated by selecting a different alternative or implementing mitigation. Like many portions of the DEIR and RDEIR, the findings are not supported by substantial evidence, lack adequate explanation, and are otherwise legally insufficient.

There is no way for the Council or the public to know whether the identified benefits of the Delta Plan outweigh these and the other significant impacts *that have not been properly disclosed and/or mitigated*, and one of the ways in which the Findings are deficient is that they do not acknowledge all of the Project's significant impacts. As just one example, the Findings are deficient in their conclusions related to Project-specific and cumulative impacts to water resources. (See Findings at p. 76.) The Findings acknowledge that cumulative impacts to water resources will be significant, but then claim that MM 3-2 will reduce Project impacts related to the depletion of groundwater to a less-than-significant level for covered actions. (Findings at p. 60.) However, for the reasons discussed in the Public Water Agencies' previous letters, the Delta Plan *will* likely significantly impact the Public Water Agencies' ability to provide adequate water supplies, leading to increased reliance on groundwater, which will likely substantially

deplete groundwater supplies in multiple areas. Despite this, MM 3-2 provides mitigation only for construction-related impacts to groundwater, and does not mitigate for the significant impacts to groundwater due to operational aspects of the Delta Plan. Moreover, even its proposed mitigation for construction is inadequate, because digging deeper wells does not prevent depletion of groundwater, instead it may result in *more* groundwater being depleted and thus *greater* impacts to water resources.

In addition, there is no substantial evidence supporting the proposition that the Project's purported "benefits" actually exist. For example, the statement of overriding considerations claims that the Delta Plan will have a number of benefits, including "protecting, restoring, and enhancing the Delta ecosystem by encouraging a more natural flow regime through the Delta." (Findings at 97.) There is no substantial evidence in the record demonstrating that the Delta Plan will result in any such "benefit," no description in the record relating to what a "more natural flow regime" consists of, and no science demonstrating that such unidentified flow regime has *any* concrete environmental benefits. The statement of overriding considerations also states that the Delta Plan will "enhance the unique cultural, recreation, natural resources, and agricultural values of the Delta . . . by conserving farming and rural land use . . . ," "encouraging emergency preparedness, appropriate land uses, and investments in flood protection." (*Ibid.*) There is no substantial evidence supporting these conclusions in light of the fact that *the DEIR, RDEIR, FEIR, and findings all acknowledge the Delta Plan will have significant impacts in these areas.* When a project causes environmental impacts, such impacts can hardly be considered a "benefit" of the project.

Regarding the significant impacts that cannot be mitigated to a level of less than significant that the Delta Plan *does* acknowledge, these are enormous in number and scope. These include significant impacts relating to biological resources, hydrology/flooding, land use and planning, agriculture, forestland, aesthetics, light and glare, air quality, pollution, cultural resources, earthquakes and landslides, soil erosion, leakage, mineral resources, noise and vibration, recreation, transportation, hazards and emergency access, adopted plans and policies, greenhouse gases and climate change, among others. The "benefits" of the Project (which, as discussed above, are not actually extant) do not and cannot outweigh these many enormous environmental impacts, particularly because the EIR grossly underestimates the Project's impacts.

CEQA also requires adopting a mitigation monitoring and reporting program ("MMRP") for any project that requires mitigation. (Pub. Res. Code, § 21081.6.) The Delta Plan MMRP, among other legal deficiencies, merely reiterates the fatal flaws in the DEIR's and RDEIR's mitigation measures, including the lack of specificity, enforceability (due to lack of mandatory language), and performance standards for many of the included measures. Accordingly, the EIR, the findings, the statement of overriding considerations, and the MMRP must be substantially revised in order to be legally compliant.

Conclusion

The Public Water Agencies believe that the FEIR, findings, and MMRP are legally inadequate, including but not limited to those deficiencies identified above and in previous comment letters. For this reason, the Public Water Agencies urge the Council to address these inadequacies fully

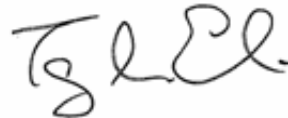
before taking any action on the Project. Reviewing the other comment letters on the Project, it seems the Public Water Agencies' concerns are echoed by other agencies, as well, demonstrating that the Council's assumptions and "analyses" of the Project are almost uniformly rejected by the very agencies that are experts on many of the issues discussed in the EIR. Accordingly, the Public Water Agencies urge the Council to reject premature action on the inadequately reviewed Project, before the Public Water Agencies' members and their water users begin to suffer the impacts of the Project's significant, inadequately analyzed and disclosed environmental impacts.

As always, the Public Water Agencies would be happy to discuss other ways to ameliorate the identified problems.

Sincerely,



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